Supreme Court, U.S.
FILED

No. 96 421 JUL 24 1996

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In The

Supreme Court of The United States

October Term, 1996

WILLIAM KUNTZ, III,

Petitioner,

- v -

WILBUR A. FADNESS, individually,
and as Successor in Trust for
MILDRED H. FADNESS,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

WILLIAM KUNTZ, III
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Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (4399)

QUESTIONS PRESENTED FOR REVIEW

Does being [1] one minute late for a Pre-Trial conference call made between Montana, California and New York warrant the District Court Judge Holding Defendant in contempt?

Does being held in contempt, warrant omission/presentation of prima facie evidence to the jury?

Does the existence of prima facie evidence, under the Montana Deadman's Statute warrant reversal in the Supreme Court of Montana of Defendant's right to a fair trial under the Equal Protection Clause of the Federal Constitution?

Does the jailing of Defendant, before the jury, for no discernable or reasonable basis deny Defendant a fair trial?

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GROUNDS FOR JURISDICTION

Under the Provisions of 28.U.S.C.1257, an appeal for certiorari to the United States Supreme Court from "final Judgements or decrees rendered by the Highest Court of a state in which a decision could be had... federal jurisdiction" tensions in the allocation of judicial power, Martin H. Rebbish, Bobbs-Merrill Co., Inc. Charlottesville, VA 1980.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

Defendant, William Kuntz, III, appeals from the adverse rulings of the Supreme Court of Montana on his appeal and upon his Motion for Reconsideration/Reargument.

Defendant, a resident of the State of New York, was sued in contract over purchase of 160 acres more or less of farmland in north eastern Montana of the north branch of the Missouri River, in Roosevelt County Montana, 15th Judicial District of Montana.

The presiding District Judge recused himself and retired Judge Leonard H. Langen was assigned the case. A trial was had before a jury in September of 1994.

An appeal was taken and considered by the Supreme Court of Montana and the judgement of the District Court upheld. Defendant moved for Reconsideration - Reargument - Rehearing and that was denied. That denial was on the 25th of April, 1996.

THIS CASE

This case involves a rather simple contract action, which has been converted into on ongoing episode of litigation between the parties.

In 1988, Defendant owned a building in Dayton, Ohio, which was taken by the City of Dayton, Ohio, for a downtown development [see *City of Dayton, Ohio vs. William Kuntz, III*, et al.---U.S.--- also *Kuntz vs. Manley, Burke and Fischer*, LPA, et al. ---U.S.---]

Defendant was coming into funds and wished to reinvest same. Defendant also wished to preserve the ongoing net operating

loss carryforward of the Peter Kuntz Company [see *Kuntz vs. Shawmet Bank, et al.* ---U.S.--- and *Kuntz vs. Winters National Bank* ---U.S.---]

Defendant purchased a lumber yard in Wolfpoint, Montana.

Defendant also entered into a contract to purchase land from the Plaintiff.

The Plaintiff could not close upon the contract as the deed was still in escrow with the Western National Bank in Wolfpoint, Montana.

Defendant released his escrow so Plaintiff could obtain the deed. There was a real estate closing at the Roosevelt County Title Abstract Company in Wolfpoint, Montana, across the street from Defendant's lumber yard for the farmland.

Plaintiff was paid about $3,000 upon closing. About a year later, Defendant contacted Plaintiff about the payoff on the balloon mortgage and wrote that there was never a sale and that no deed was ever recorded.

Defendant had the title company send documents to Plaintiff which in fact established that there was a sale, etc.

Plaintiff hired a lawyer and there were settlement discussions. Defendant's lawyer withdrew when it became apparent that the Western National Bank, the escrow agent for the first deed might be drawn into the fray, those lawyers were from Williston, North Dakota, and were admitted to practice in Montana.

After some delay and discovery, there as a pre-briefing telephone conference set up by Plaintiff. Defendant was connected one minute late and Judge Langen, in Montana, held Defendant, in New York in contempt for work done by the AT&T operator in Pleasanton, California.

By virtue of the prior contempt, Judge Langen would not allow prima facie evidence of the Plaintiff's attempt to repudiate the contract almost a year after closing and after ratification of changes okayed by their realtor, who was also a State Representative and now is one of the County Commissioners in Roosevelt County. This was in the form of a certified letter from now deceased Mrs. Fadness to Defendant.

During the trial, Judge Langen had Defendant removed from the witness box and place into custody before the jury.

The proposition of a fair trial and equal protection between the citizens of the different states is a right guaranteed by the Federal Constitution.

The holding of one in contempt, by being one minute late for a conference call across the country is a total abuse of the judicial function. Evidence was presented to the Court in Montana by letters from AT&T showing the one minute lateness. This did not dissuade Judge Langen.

At the time of trial, all of the fraud claims were found to be meritless by the jury. Judge Langen would not allow other prima facie evidence defined by Montana's own laws before the jury and when other relevant facts began to come out, he ordered Defendant jailed.

While there is no pressing reason the Court should grant this petition, the alternative is for jurists in Montana in State Court proceedings to run rough-shod over out of State Defendants to meet their ideas of Justice and not the broad principals of law.

BACKGROUND - PROCEEDINGS AND FACTS

This is a dispute over a 160 acre 1/4 Section, about 7 miles Northwest of the Town of Wolfpoint, Montana in Roosevelt County. About half rangeland and half cropland.

The Plaintiff, Wilbur A. Fadness, purchased land from his sister-in-law, Thelma Berglund, in the early 1980's and a Deed was placed in Trust in the hands of the Western National Bank. During the 1980's the crops were very poor.

During this time, Wilbur A. Fadness's first wife passed away. He had a son by the first marriage, Richard Fadness. Wilbur remarried and moved away to Washington State. Wilbur and his second wife put the property up for sale Dorthy Cody was a Realtor and a Member of the Montana Legislature. She was given a listing.

William Kuntz, III and his wife, Anne reside in New York State, north near the Canadian Border. Defendant, Kuntz owned a Delaware Corporation, Wolfpack Electronics Company, Inc, which made and sold electronics, specifically radar equipment. In the late 1980's, Wolfpack's landlord filed Bankruptcy and the Building was sold in Dayton, Ohio. As a result, Defendant Kuntz

decided to move his company from Dayton, Ohio to Wolfpoint, Montana. He subscribed to the Wolfpoint Herald News. In 1988 or 1989, Defendant and his Company purchased the former UBC Lumber Yard in Wolfpoint.

This Lumber Yard had a number of Buildings, and was assessed from the point of being an operating Lumber Yard. Defendant, began efforts to bring the value for taxes down to the purchase price. This went to the Montana Board of Tax Review.

Dorthy Cody advertised the Fadness Property in the Wolfpoint Newspaper, the Herald News. Defendant saw the ad and contacted the Realtor's Office in Montana by phone.

Letters and Contracts were exchanged by mail. An agreement was reached and recorded in the County Recorders Office. Defendant requested a Title Exam and Title Insurance. When the commitment came through, Defendant discovered that the land was still titled in the name of Thelma Berglund and that the Plaintiff was unable to deliver title, as there was a balance owed to Western National.

Defendant still wanted to purchase the 160 acres. It was agreed that Defendant's wife's name would be added to the deed and that Defendant (Kuntz) would only sign the deed. Kuntz agreed to release his escrow deposit to pay the Bank. The terms of the sale were fairly simple. A Deed was prepared by a lawyer in Wolfpoint, sent to the Plaintiff, signed and then returned to either Dorthy Cody or Roger Wimmer, the Escrow Agent and Title Examiner. The Deed had Kuntz's wife added to it, to reflect the agreement.

A Mortgage was prepared and sent to Kuntz. Plaintiff contends that there was a note, but there was no evidence of a note and neither the realtor, lawyer or title agent either recalled a note or had a copy of a note, which the lawyer testified to that he kept no copies of these records.

As maker of the Mortgage, Defendant Kuntz modified it and sent it for recording, while the land was under contract and while it was still titled in Berglund's name.

Without further advise to Defendant, Kuntz, Wimmer and Cody effected the Closing and distributed the Money to Fadness. There was a surplus in the escrow and that was sent to Defendant, Kuntz.

Prior to the maturity of the Balloon payment due on the Mortgage, Kuntz came into surplus funds. Kuntz requested that Alan Sunukjian, on behalf of his company write to Fadness to see about taking an assignment of the Mortgage.

There is a substantial dispute in the mind of Plaintiff's lawyer, as to what a 'discount' is in Negotiable Instruments. 'Discount' in the sense of a pre-maturity transaction would be a mathematical calculation of the current interest rates to the rate on the instrument which would result in an adjustment of the amount due, by virtue of the early payoff.

Plaintiff's Counsel saw this as a dark and somber ploy. During this time, Mrs. Fadness, now deceased, wrote to Defendant, by certified mail and in effect sought to repudiate the sale. Upon receipt of the letter, Defendant requested that the Title Agent, Roger Wimmer write to the Fadnesses and explain that there had been a sale and that their interest in the Deed of Trust with the Western National Bank had been paid off and that a check was sent to them at the closing at the time the Realtor's fee and other expenses were paid.

At this time, the Fadnesses contacted another Attorney in Washington and Richard Fadness became aware of this. Defendant and or his attorney (for Wolfpack) had no further contact from the Fadnesses for about a year. Then a letter came from the Sullivan and Tabaracci firm in Missoula, demanding payment. A reply was sent.

Legal Papers were prepared by the Sullivan Firm. But before they were filed, Mrs. Fadness died. The suit was filed and then later, papers were filed in Roosevelt County, Montana to administer her estate.

Defendant engaged a firm of lawyers in Willison, ND who are admitted to practice in Montana. There was an Answer filed. There were further efforts to resolve this, including an offer to rescind the sale and restore matters to status quo. These offers were rejected by Plaintiff's Counsel.

When it became clear that the cost of litigation was going up and up and that the Western National Bank, a substantial client of the firm in Willison was going to be drawn into the litigation, that firm withdrew.

The Trial was set for the middle of 1993, before Judge

Sorte. Judge Sorte, then received a Motion, by Plaintiff's Counsel to adjourn and continue the trial date. This was granted. A new Date was set in 1993.

In July, 1993 Judge Sorte requested that the matter be taken over by another Judge. Judge Langen, of Glasgow, was given the case. In August, 1993 Judge Langen continued that trial date again.

In March, 1994, Plaintiff again requested a Trial Date. There had been a request for a Jury Trial. Judge Langen set a date for the Trial and set a date for a Pre-Trial Telephone Conference.

On Aug 2, 1994 there was a telephone conference, in which Defendant Kuntz was absent. For whatever reasons, justified or not, Judge Langen held Defendant Kuntz in contempt.

A Jury was called and on the date set for Trial, empaneled without much trouble. Dorthy Cody's daughter was removed for cause as was Brian Nelson's wife. (Brian Nelson, an acquaintance of Kuntz, testified at the Fee Hearing on the Fee Award in the Spring of 1995.)

Then the Jury Panel was sworn and the Trial Commenced.

POINT I

THAT THE DISTRICT COURT DENIED DEFENDANT A FAIR TRIAL BY ORDERING HIM DETAINED BEFORE THE JURY

The cornerstone of Montana Civil Litigation is that a Trial must be conducted in order that both the Plaintiff and Defendant obtain a fair Trial and hence a just result.

> 'We start from the premise that under the Constitution of Montana both the plaintiff and the Defendant have a right to a fair trial. See *Allers-vs-Riley*, Montana Supreme Court 1995 at 603 901 p. 2d 600 citing *In Putro-vs-Baker* (1966), 147 Mont 139, 410 p. 2d 717. The guiding principle of our legal system is fairness. We must tenaciously adhere to the ideal that both sides of a lawsuit be guaranteed a fair trial. Sec 27, Art iii Montana Constitution. (Now Sec 27, Art II) *Putro* at 722, See also *Brockie-vs-Omo Const., Inc.* (1992),

255 Mont 496. 499., 844 p. 2d 61, 64.'

Defendant Kuntz respectfully submits that he was deprived the right to a Fair Trial.

The Plaintiff has stated a case for Fraud against the Defendant and Judge Langen made a number of rulings which prejudiced the Defense, to the point of denial of not only the fair and full weight of the evidence, but even the presumption when he was ordered taken into Custody, during the trial, in front of the Jury.

During the Portion of the Trial, which is transcribed in Vol 1, Pages 1 through 17, Defendant was on the Witness Stand, being questioned by Plaintiff's Attorney before the Jury.

The Court reconvened the Jury to consider the amount of the Punitive Damage award T 1&2.

Defendant produced his tax returns, in accordance with Judge Langen's prior Order and Plaintiff's Counsel examined Defendant and then rested on Page 9.

Defendant commenced his rebuttal, on Page 9. The Court allowed a brief review of Defendant's financial history, and before Defendant was able to put forward his rebuttal and his exhibits, the Court moved to curtail his presentation to the Jury.

The Court: 'I know what you are doing, I know what you're doing. I wasn't born yesterday.' Tr 13, Ln 24-26

The Court: 'I don't want to hear any more of this. You've stated that your net worth today is about $800,000, you said it to the jury.' T.16, L.9-12

The Court: 'Yeh, but you-all you do is show expenses. You don't show the income!' Tr 16, Ln 24-26

Mr. Kuntz: 'There is no income!' Tr 17, Ln 1.

The Court: 'I don't want to hear anymore from you, Quiet!' Tr 17, Ln 15, 16.

Mr. Kuntz: 'Are you going to give a rebuttal---' T.17, L.17 The Court: 'I'm going to have the Sheriff put you in jail if you don't shut up.' Tr 17, Ln 18-20

Mr. Kuntz: 'Then why don't you do that?' Tr 17, Ln 23

The Court: 'I will.' Tr 17, Ln 22

Mr. Kuntz: 'Well, then go ahead.' Tr 17, Ln 21

The Court: 'If you keep talking.' Tr 17, Ln 24.

Mr. Kuntz: 'Then go ahead now in front of the jury, Your

Honor.' Tr 17, Ln 25

The Court: 'Alright, Where is the Sheriff?' Tr 17,18 Ln 26, 1.

The Court: 'Alright, Take him into custody and put him in the jail. Not in the jail, just put him in custody right back here in the pew---.' Tr 18, Ln 4-7.

Mr. Kuntz: 'Thank you, Your Honor.' Tr 18, Ln 11

The Court: 'You're welcome.' Tr 18, Ln 12

Mr. Kuntz: 'I'm glad the jury understands how this case has been run.' Tr 18, Ln 13,14.

(SHERIFF'S OFFICER HOLDS DEFENDANT IN THE BACK OF THE COURTROOM.)

By taking Defendant into custody, before the Jury, the District Court denied Defendant a fair trial. As the Court may note, Defendant was representing himself during the Trial, and was testifying on his own behalf, in cross-examination or Rebuttal, to the evidence and other evidence which would bear upon the question of punitive damages.

As the Court may note, there was no heated exchange of 4-letter words, or anything of the kind which would warrant the District Court to Order Defendant into Custody. As the Transcript reflects, there was a clear and calm review of items to be considered by the Jury, which in the estimation of the Defendant would have resulted in an Award of $0. As this Court may note, from the Judgment, the Amount on the Mortgage and a sum of Interest was due, nothing more. It is clear that the District Court was displeased with the direction that the Rebuttal Evidence was taking and that the only way the Court saw fit to limit this was to have the Defendant detained before the Jury.

As may be noted from the transcript, Defendant respectfully addressed the Court, even after he was taken into Custody.

By directing the Sheriff to remove Defendant from the Witness Stand, while he was testifying, clearly prejudiced his case, and thus clearly calls for a reversal of the Punitive Damage Award.

The detention of Defendant before the Jury raises a number of fundamental questions. By detaining Defendant, before the Jury, who represent the People of the State of Montana, the District Judge holds himself and his power above that of the

People. The correct procedure, which was not observed, was for the District Judge to direct the Bailiff to excuse the Jury from the Courtroom, then admonish Defendant outside of the hearing and sight of the empaneled jury. If the Court saw fit to Jail Defendant, then the Jury should have either been sent home for the day, to reconvene in the morning, or reconvene with Defendant absent from the Courtroom with no comment as to his absence by either the District Judge or Plaintiff's Counsel. This was not done.

Needless to say, most Jury Pools are taken from those sources of information available to the District Court, ie Voter Lists, Drivers Licenses, etc. To have a Defendant taken into custody, in the Courtroom, by an armed police officer not only disturbs the decorum of the Court, but inflames the Jury to be predisposed to find for the Plaintiff. An examination of the exhibits which were at issue reveals that there was only evidence and questions of evidence in dispute. Defendant was not swearing, leaping to the top of the defense table, threatening the Court or any other offensive Action.

What apparently offended the Court was that the Jury might not come in with a punitive award in any large Amount, for example come in with $1 that upset the Judge.

POINT II

THAT THE DISTRICT COURT DID NOT RULE ON DEFENDANT'S MOTION, THAT THE FORMER LAWYERS DELIVER THEIR FILE, SAID MOTION BEING FILED OVER A YEAR BEFORE TRIAL

In 1992, the Lawyers from Williston, North Dakota filed papers to withdraw from the representation of Defendant and his wife. Defendant filed a Motion to require that the legal file, of that firm, be delivered to the Court Clerk. This Motion, made almost two years before the trial was never ruled upon by either Judge Sorte, or Judge Langen.

At the time of Trial, Defendant caused a subpoena to be served by the William County, ND Sheriff upon the respective law firms. At the time of Trial, these files were delivered to the Clerk of the District Court and the RECORD on Appeal contains a letter

from that firm. Ex. 67

Mr. Kuntz: 'I filed a motion- I filed a motion eighteen months ago, asking that file be brought over here, and it was only on subpoena-- the motion was never ruled on. It was only on subpoena that they produced it, as Mr. Rathert was understanding of the blown out of proportion situation here over a small piece of land and he was very accommodating on it, and I told him I would not try and breach the attorney's charging lien or retaining lien, if you will, on.' Pg 129,130, Ln 22-26, Ln 1-3.

Duane Kurokawa:

'I'm loan officer at Western National-- Western Bank of Wolfpoint, formerly Western National Bank.' Pg 126, Ln 23-24.

Mr. Kuntz: '...You have a file in your possession that relates to the Berglund real estate transaction that was held by the bank.' Pg 127, Ln 12-14.

Duane Kurokawa: 'Yes, I do.'

Mr. Kuntz: '...Let me ask you this, who are the attorneys for the bank?' Pg 127, Ln 24-25.

Duane Kurokawa:

'Bjella, Neff, Rathert, Wahl and Elkin.' Pg 127, Ln 26

As the Court is aware, there are not a whole lot of people living in Eastern Montana and Western North Dakota. When it became clear that there was to be a parting of the ways by Defendant's lawyers, Defendant took steps to ensure that the legal file, of the Bjella Firm, would be in Wolfpoint, Montana, by filing a Motion with the Court. That Motion was never ruled upon by the Court.

Needless to say, when it appears that the Western National Bank and the prior owner were being drawn into the chain of facts, the access to that file, upon suitable arrangements well in advance of the trial, should have been resolved.

The Plaintiff's position was not impaired by the failure of the Court to rule on this Motion, but the Defendant's case, where there is obvious conflict between existing clients of the law firm is impaired and the lack of a ruling neatly compounds that.

POINT III

THAT IT WAS CLEAR ERROR FOR THE DISTRICT COURT TO EXCLUDE THE BERGLUND EVIDENCE.

It was clear error and an abuse of discretion for the District Court to deny admission of the Berglund evidence.

At no time prior to the title exam did the Plaintiff or Plaintiff's agent disclose to Defendants that the land was titled in Berglund and that they were unable to recover the deed from Western Bank.

The essence of a Contract is the ability to preform. Defendant was being sued for fraud and to not allow very relevant and important evidence to go before the Jury was clear error and should result in reversal and the granting of a new trial.

Mr. Kuntz: 'As far as I'm concerned, Your Honor, nowhere--until I saw the title report, I had always thought that the Fadnesses owned the property. When I read the title report and found out that they were not the owners of the property that they had it under contract and that their contract was in default, I called Thelma Berglund, and she said I have no plans to take other steps and complete the situation. I'd like to get paid off on this thing, and that's when I became apprehensive at the situation---' Pg 41, Ln 7-15

The Court: 'The fact that they couldn't have cleared the title without your money is inconsequential here.' Pg 45, Ln 17-20.

The Court: 'Now, wait a minute, You claim that Fadness didn't have a right to use that $5,000.00 to clear the--to pay off Berglund, is that it?'. Pg 40, Ln 19-22.

The Court: 'Why did they send you $1400.' Pg 53, Ln 15,16

Mr. Kuntz: 'For the excess over the escrow. I overescrowed the account by $1,500.00.'

The Court: 'Well, you were supposed to pay $5,000 to the escrow account.'

Mr. Kuntz: 'I put $6,700 in the escrow account.' P.53 L.17-21.

Mr. Kuntz: 'The only scenario is, Your Honor, as I said in

Court, is that the time the mortgage was recorded, the title was in Thelma Berglund's name. There was at least three days for the mortgage to find its way from here (the Roosevelt County Courthouse) to there, to lawyer Schuster's office... my intention was to record the mortgage, send it over there, let em be happy with it, then there would be a note, and then there would be a closing, you know. Mrs. Cody, Mr. Wimmer, Mr. Schuster, jumped the gun. I got a letter in the mail with a check for $1,400.' Pg 53, Ln 4-14.

Mr. Kuntz: 'I hope, Your Honor, I will have an opportunity to inspect the file with the bank. I mean I'll take that up with Mr. Kurokawa. The contract between Berglund and Fadness had the right for the Berglunds to recind or cancel and take the balance paid as penalty...' Pg 64, Ln 17-21.

Mr. Kuntz: '...But, in the (Berglund-Fadness) agreement, and the supplemental agreement which Your Honor already ruled but I was not able to go into. But, in the agreement, it shows a pay-off date in 1983 and the fact that seven years later, they still didn't have the deed...would raise my degree for a reasonable person's degree of caution...' Pg 188 Ln 12-23.

It is only fair and reasonable, that a party being accused of fraud, should be allowed to put the broadest set of facts before the Jury for it's deliberations. The fact that the Fadnesses had the property on the market for years and were unable to sell it, that they were in default of the Deed of Trust agreement for years and were not in a position to cure without the funds of Defendant in escrow is clearly relevant to the Jury's deliberations.

A careful review of the Plaintiff's complaint states that Defendant did a number of things in order to gain an unfair and hence fraudulent advantage over the Fadnesses.

However, when the Court began to examine the actual Evidence the truth began to emerge.

The Court: 'Where does this say anything about, to keep your wife off the mortgage, but put her on the deed?'

Mr. Kuntz: 'This one.'
The Court: 'This one says that?'
Mr. Kuntz: 'Yes, Your Honor, It says that the Plaintiffs acknowledge that they were aware of that.'
The Court: 'If she said that, it looks like Mrs. Cody should have been a party to this suit.'
Ms. O'Rourke-Mullins:
'That's what that says, There is a separate complaint against Mrs. Cody, Your Honor.'
The Court: 'You've got another thing filed?'
Ms. O'Rourke-Mullins: 'Yes.'
Mr. Kuntz: 'Pending?'

POINT IV

THAT IS WAS CLEAR ERROR FOR THE DISTRICT COURT TO EXCLUDE THE FADNESS-vs-WIMMER AND CODY LAWSUIT

It was a clear abuse of discretion and error for the Court not to allow into evidence the fact that Fadness was also suing Mr. Wimmer and Mrs. Cody in another lawsuit.

Contained in Plaintiff's list of proposed exhibits which never was allowed before the Jury was a letter from Mr. Fadness and his now deceased wife. EXHIBIT 29

Defendant was not allowed to put this letter, nor the underlying certified letter into evidence.

Letter to Roger Wimmer:

> 'Regarding your letter of July 26, 1991. Fail to see any confusion in regards to sale...suggest you change the mortgage...'
>
> 'He was sent a certified letter stating the terms...At that time the land plus any structures, improvements will revert back to us. Mr. Kuntz will then be taken to Court and sued for the amount due plus interest...'

A review of Exhibit 24, reveals that Fadness was sent a check by Mr. Wimmer for $3,867.83. It further states that the

Escrow at Western National was paid off.

Clearly, the Jury should be allowed to know that there was another lawsuit pending, against both Cody and Wimmer, who testified on behalf of Plaintiff.

The fact that Wimmer and Cody were also being sued by Fadness withheld from the Jury, reached both the credibility and the underlying dispute, ie the closing of the Escrow.

The evidence is clear that only after taking the money and then waiting a year did the Fadnesses become either unhappy with the sale, or did not grasp all the events.

As mentioned in the letter to Mr. Wimmer, there was a certified letter sent by deceased Mrs. Fadness to the Defendant. The Court would not allow it to be introduced into evidence for the Jury to consider. It was sent certified mail and the original was produced in Court. Believed to be marked as Exhibit 28 is a Certified letter from deceased Mrs. Fadness. Contained in Exhibit 28, is a group of documents numbered after 28

The Court: 'What is your question to Mrs. Cody?'

Mr. Kuntz: 'I'm simply trying to establish that this return address on this envelope is in fact her client's address.'

The Court: 'You may answer, Your objection to that is overruled.' Pg 243, Ln 13-18.

Mr. Kuntz: 'Thank you, Your Honor, And that is Exhibit 28. (By Mrs. Cody) That's the address that we have on the listing agreement.' Pg. 243 19-21.

(By Mrs. Cody): 'A number, On the Certified Mail?'

Mr. Kuntz: 'Yes.'

(By Mrs. Cody): 'Ah, P 351 365 464.' Pg 244, Ln 7-9.

Plaintiff objected through Counsel a number of times that these papers should not be admitted and that she had never seen them before. Pg. 265

Plaintiff further states that her Motion to compel was never complied with. A review of the District Court Docket reveals that the Transcript of the Pre-Trial Hearing/Conference was docketed. A review of that Transcript reveals that the Order compelling further discovery was made only weeks before the trial and then reduced to writing by the Court.

POINT V

THAT IT WAS CLEAR ERROR FOR THE DISTRICT COURT TO EXCLUDE LETTERS AND CERTIFIED LETTERS FROM DECEASED MRS. FADNESS

The transcript of the Trial reflects that Defendant promptly obtained a copy of the Transcript of the hearing and promptly complied to the Court's Direction that the further documents requested by Plaintiff, be produced and they were. Due to the fact that the Court retained the Original copies in Glasgow, they were not docketed with the District Court Clerk, until the Trial was underway.

Mr. Kuntz: 'Your Honor, I would like to make it clear on the record that the original letter addressed to Your Honor and the original affidavits which inadvertently found their way to your file, Your Honor is delivering to the District Court Clerk's Office and directing that she file those, and including is the, I believe, my affidavit with regards to the conference call of the 2nd of August.' Pg. 138, Ln 20-26.

Mr. Kuntz: 'Your Honor, subsequent to the August 2nd pretrial telephone conference, signed an order on the 22nd of August directing me to comply with the discovery request to do certain other things, including holding me in contempt for missing the Telephone Conference. As Your Honor is aware and the Record will reflect, on the 2nd of September, then days after the order was signed and six or seven days after that order was signed (served) I produced the documents...' Pg 139, Ln 25, 26 P.140, L.1-6.

District Court Docket Number 85 is a Document entitled:

Motion under Rule 12(C). Contained in that document and served upon Plaintiff's Counsel are many of the Documents which Plaintiff's Counsel complains that she had never seen. Defendant complied with the Order and produced the documents promptly and they were available

to Plaintiff's Counsel for a month before Trial.
The Certified letter, from deceased Mrs. Fadness, is of great significance.

The handwritten note, which should be marked as Defendants 30

6/28/91

'Mr. Kuntz,

We hold the title to the land - not you... Please remit amount due by the time allotted or the contract is null and void.'

The Court: 'Now, let's see what this is here. This is something that you wrote to Mrs. Fadness and this is her response, isn't it?'

Mr. Kuntz: 'Yes. And these are the documents that came back in response in the certified letter identified by Mrs. Cody.'

The Court: 'There's nothing new here, is there?'

Mr. Kuntz: 'I believe it's all new. In fact I believe that's an original letter that was inadvertently sent by Mr. Wimmer to the Plaintiff instead of the Defendant...that can be fairly well concluded by the crease marks on the envelope folded together fitting inside the envelope.' Pg 268 Ln 10-23.'

It is clear that the Plaintiff's understanding of the events which led to the lawsuit and those of the Defendant were not even close. As Mrs. Fadness was not available, her letter, should have been allowed to be admitted and to go before the Jury. This error was so prejudicial to the Defense that it warrants a New Trial.

POINT VI

THAT THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING DEFENDANT'S INSTRUCTION AND QUESTIONS TO THE JURY AND CLEAR ERROR FOR THE DISTRICT COURT TO WITHDRAW QUESTIONS AFTER THE JURY BEGAN IT'S DELIBERATIONS

The Defendant submitted a great number of instructions

for the Jury and a great number of questions for the jury.

On a wholesale basis, without regard to the requirements that Defendant be afforded a fair trial the District Court would not allow these instructions or questions.

There is no basis in fact or law for the District Court to have rejected so many of Defendant's submitted questions and Instructions. Most of the Instructions were form instructions available to Defendant in New York.

Even after allowing only a very few questions, the District Court committed plain error. The jury having been empaneled and having gone into deliberations sent out questions.

AT APPROXIMATELY 2:51 P.M., THE JURY SENDS OUT QUESTIONS DURING THEIR DELIBERATIONS.

Ms. O'Rourke-Mullins, Mr. Kuntz and Judge Langen meet in Chambers.

The Court: 'The time is 2:51 P.M., I received a whole series of questions.'

Mr. Kuntz: 'Do they need to be marked, Your Honor?'

The Court: 'Pardon.'

Mr. Kuntz: 'Do these questions need to be marked?'

The Court: 'Yes, we can mark them, but not right this minute...I intend to advise the jury that they need not consider nor answer the interrogatories propounded to them by the defendant...' Pg 219 Ln 5-15, 24-26, Pg 220, Ln 1,2.

Mr. Kuntz: 'First Your Honor, I submitted a great number of proposed questions of which Your Honor threw out approximately 75 questions. Your Honor went through and allowed these three or four questions.' Pg 219, Ln 9-12.

Once the Court had approved questions for the Jury, it was clearly improper and clear error for the Court to withdraw Defendant's questions just to avoid a hung Jury or perhaps for the defendant to prevail on the issues of fraud which opened the door for the Punitive Damages and the Attorney's Fees.

Mr. Kuntz: 'Alright, Then I guess they're allowed to continue to correspond or it's a hung jury.'

The Court: 'No, we've got to put an end to this or we're going to be here forever, and I don't see any relevancy to

these questions.' P.220, Ln 18-23.

Mr. Kuntz: 'May I ask Your Honor what the effect would be of a hung Jury in a civil case?'

The Court: 'I've never had a hung Jury in Montana on a civil case.'

Mr. Kuntz: 'I'm just asking what would be the effect.'

The Court: 'We'd have to try the case all over again.' Pg 221, Ln 16-22.

At every critical step of the Trial, the Court ruled against Defendant. The Berglund Contract was not allowed, the letter from Mrs. Fadness, deceased, was not allowed, the suit against Mr. Wimmer and Mrs. Cody was not allowed. Even with all of these and the apparent sympathy of the Court in favor of the Plaintiff, there can be no justification for the withdrawal of Defendant's questions to the Jury, after they were deliberating. This is clear error and warrants a new trial.

POINT VII

THAT IT WAS CLEAR ERROR FOR THE COURT TO OVERRULE THE DEFENDANT'S OBJECTION TO PLAINTIFF'S LAWYERS MISLEADING THE JURY IN CLOSING ARGUMENT AS TO THE SALE PRICE AND FACTS INVOLVING THE LUMBER YARD PROPERTY IN WOLFPOINT

During the summation of Plaintiff, Counsel made a reference to the Defendant's purchase of the old UBC Lumber Yard in Wolfpoint.

Ms. O'Rourke-Mullins:

> 'Mr. Kuntz knows how to do that. He told you about owning the UBC Lumberyard here in Wolfpoint. Now, that has no relevancy to this case either, but the only reason it interested me, and the only reason I wanted to hear about it was because he told you what he did in that case, purchased the UBC Lumberyard for $ 31,000 on a mortgage financing arrangement in his name... What that means, Ladies and Gentlemen, is he doesn't wind up paying $31,000.00 as he agreed. He winds up paying

$25,000.00...'

Mr. Kuntz: 'Your Honor, I'm going to object. That is not in evidence. It was objected to in the terms of the sales price of that property. The deeds are of record...'

The Court: 'If you want to make an objection to what she is saying, but otherwise don't interrupt her.'

Mr. Kuntz: 'Excuse me, I did make an objection.' Pg 271, Ln 7-26.

Mr. Kuntz: 'The terms of the UBC sale are matters of public record downstairs (in the Courthouse) and the plaintiff objected to me placing those in evidence. The records downstairs reflect that the purchase price of the property was $32,000. That was paid. The difference was the $25,000, and that was by assignment from the former owners of the UBC...'

The Court: 'Now, I'm not going to let you get up here and give a speech. You haven't made a definite objection.' Pg 272, Ln 3-12.

A clear and knowing misstatement of facts in summation by Plaintiff's Counsel is clearly improper. The lawyer for Mr. Fadness wanted the Jury to think that Defendant had obtained a $6,000 cut from the former owners of UBC when he took the Mortgage by assignment. Not only was this improper, but the matter had already been litigated before the Montana State Tax Appeal Board in Docket Case PT-1991-350 & PT-1992-119R. These Findings of Fact, Conclusions of Law, and Order were already known to Judge Langen and to Plaintiff's Counsel.

Pg 3 of the Findings:

'The agent for the taxpayer testified that Mr. Kuntz purchased the subject property (UBC Lumber Yard) in 1989 for $32,000.'

That on page 9 of the Order, the state Tax Appeal Board ordered the assessment reduced to that amount.

It was improper for Plaintiff's Attorney to make such a calculated misstatement and it was further error and error which this Court should examine for the District Court's overruling of Defendant's objection. It can be by no happenstance, that the Jury would come in at that exact amount as the punitive Damage award, relying upon the factual misstatement of Plaintiff's Attorney.

The failure of the District Court to sustain this Objection warrants vacation of the Punitive Damages or a New Trial, as well as disallowance of the Attorney Fee Award.

POINT VIII

THAT THE DISTRICT COURT ABUSED IT'S DISCRETION AND AWARDED CLEARLY EXCESSIVE FEES

It is logical and consistent that an Award of Attorney's Fees must be somehow related to the underlying action. In this Case, the Original Complaint sought to foreclose upon the Mortgage, reform the Contract, Equitable Title Punitive Damages and Attorney's Fees.

Notwithstanding all the rulings unfavorable to the Defendant, the jury concluded that based upon the evidence that the Plaintiff's or Plaintiff's Realtor, Mrs. Cody had added Defendant's wife's name to the Deed, while in her (Mrs. Cody) custody and that was done with either the authorization or assent of the Plaintiff. The evidence is clear that Plaintiff was unable to cure the default in the Berglund Contract without Defendant's funds in escrow and that a review of the evidence, not allowed to go to the jury, showed that the Plaintiff's Case was in very poor condition.

Normally, settlement negotiations are not considered by Courts, but here it is useful for the Court to view that the Defendant offered the full amount of the mortgage, interest and a reasonable amount of attorney's fees over 4 years ago.

Plaintiff's attorney stated that they did not want the land back, but when the time came for the land to be put up for sale, Plaintiff outbid Defendant paying in excess of the Mortgage.

The single remaining fact upon which the punitive damage claim rested, was the making of the mortgage by Defendant. Defendant was not allowed to show, that at the time of recording of that instrument, title remained with Thelma Berglund and it was the 'jumping of the gun' mistake at closing by the title agent, that led to the fanciful theory of Plaintiff's counsel. This transaction was in effect more or less a 'handshake deal' with the escrow funds being released to obtain the release of the Deed from

Western Bank. There were no elaborate instructions to the Escrow Agent, because none were seemingly needed.

It was only afterwards, when the present Lawyers for Plaintiff sought to put the darkest view upon this sale, that the oversights and omissions became significant.

The Award of Attorney's Fees of $16,013.95 and the additional sum of $3,117.82 to collect on a mortgage of $19,500 is clearly not only excessive but remarkable in light of the evidence. What is even more remarkable is that the District Court would even consider, much less permit another Attorney, who had represented Defendant's tenant, Dave Madison to testify on behalf of Plaintiff's attorney's fee Application.

Mr. Kuntz: 'Your Honor, as a point of clarification, it's my understanding--and my memory may fail me that Ms. Johns represented a party in this case that was dismissed, Dave Madison?.'

Ms. Johns: 'Yes.'

Mr. Kuntz: '... I do not believe it would be appropriate for the Court to allow Ms. Johns to testify, at least without the permission of her client, Mr. Madison...' Pg 7, Vol II, Ln 16/26

The Second amended Affidavit of Attorneys Fees and Costs reflects on page 19, that Ms. Johns was paid the sum of $374 to testify to bolster the hourly rate of Plaintiff's Counsel.

However, when Defendant sought to introduce the bill of Attorney Zemyen of Wolfpoint, showing a much lower hourly rate,

Mr. Kuntz: 'I was not aware, Your Honor, that the Plaintiffs were going to produce Mrs. Johns as a witness, and despite her prior representations of Mr. Madison, I haven't made an issue of it...' Pg 75, Ln 24-26

Ms. O'Rourke-Mullins:

'Your Honor, I object. This is totally irrelevant to this case.' Pg 76, Ln 3,4.

It is interesting to Defendant, that when a former adversary lawyer is paid to testify on behalf of Plaintiff's Counsel, the Court allowed this testimony. But when Defendant sought to show another local attorney's hourly rate, that the District Court overruled the admission of that rate and sustained the Plaintiff's

counsel's objection.

A careful reading of the original affidavit for attorney's fees reveals a substantial amount of work on Mrs. Fadness's estate. Further, the billing reflects work which represents conversations both with Mr. Wilbur Fadness and his son, Richard Fadness. Much of the work contained in the billings was used for the preparation of the lawsuit against Mrs. Cody and Roger Wimmer. For a case that could have been done all on paper and by Summary Judgment, except for the Plaintiff's Attorney's desire to have a go at a big punitive damage award, the fee award is clearly excessive.

Mr. Kuntz: (to Ms. O'Rourke-Mullins) 'Now, in reviewing Mr. Panasuk's answer and in reviewing, from your recollection, your complaint, aside from your theories on the fraud matter, can you explain why, given the fact that the defendant basically admitted the default, that the matter could not been brought to foreclosure at least to the title to the land by summary judgement?'

Ms. O'Rourke-Mullins:

'Because you had added your wife's name to the deed and she was not on the mortgage.' Pg 34, Ln 11-18.

Yet, this is a remarkable statement in view of the reported allocation of time in the fee application.

On Page 2 of the Affidavit, the following appears in the way of Narrative - Zane K. Sullivan, Esq.

11/25/95 Review of materials provided by Mrs. Fadness

11/25/91 Telephone call to Mrs. Fadness,...

12/11/91 Telephone call to D. Cody, ... $100

Mr. Kuntz: 'Can you tell what the billing rate is for Mr. Sullivan?'

(By Ms. O'Rourke-Mullins)

'It's on the amended affidavit. It was $ 100 per hour.' Pg 11, Vol II, Ln 22-25.

Assuming that Mrs. Cody was candid with the Plaintiff's Counsel, they were well aware early on of the status of the deed and the mortgage.

A review of Page 5 of the Affidavit reveals that at the time

a generous settlement was offered, that the bill had only reached about $1,000. 7/28/92 Call from L. Panasuk regarding counteroffer.

Mr. Kuntz: 'And do you recall - and I believe that it's contained in the omnibus observations that I made that the Defendant had offered to rescind the sale to the Fadnesses?'

(By Ms. O'Rourke-Mullins)

'I though that it was an offer to assign...' Pg 21, Vol II, Ln 16-18.

Mr. Kuntz: 'And at that point in time, the legal fees involved were $2,700, and it would have resulted in -- well, well let me ask you this first. How old is your client?'

A: I believe he's 85.

Q. And that was 3 years ago.

A. Yes

Q. And at that point in time, your client could have expected a substantial recovery on the mortgage and generally satisfaction of your attorney's fee?

A. No, he couldn't'. Pg 23, Vol II, Ln 1-10.

With all due respect, Defendant finds that Plaintiff's Counsel put it's own self interest ahead of it's client. A clear examination of the evidence allowed before the Jury and that ordered withheld by Judge Langen reveals that Plaintiff's counsel was only interested in a fat fee and a share of a damage award.

Mr. Kuntz: 'In the course of your representation, did your firm render a monthly bill to the Fadnesses?'

A. 'Yes.'

Q. 'Would you consider it attorney-client privilege to make those available to the Court?' Pg 15,16, Ln 23-26, Ln 1,2.

Mr. Kuntz: 'Would you consider it attorney-client privilege to disclose to the Court whether you intend to hold your client liable for any portion of this bill you don't recover from me?'

A. 'I do hold my client liable for this Bill.'p.15, L.3-6.

Remarkable position, having spurned a settlement offer with an elderly client, years before.

The District Court Ordered that the Plaintiff's Attorney file a Brief, supporting award of Attorney's fees based upon two leading Montana Cases. The Plaintiff's Attorney did not do this.

Mr. Kuntz: 'First, Your Honor, I would like to bring to the Court's attention, on the 10th of, 6th of December, (1994), Your Honor entered an Order or had an Order sent to the Clerk. Your Honor required that the Plaintiff file a brief based on the cases of *Forrester and MacGinniss vs. Boston and Montana*, I believe, it's *Silver Mining Company* at 29 MT 397, 74 P 1088 and also in *Crncevich*, 541 P2nd 56...' Pg2, Vol II, Ln 10-16.

The Court: 'Yes, now, I've never seen your brief.'

There followed a long discussion on the record as to whether the Brief was filed, did it in fact copy the Judge and the Defendant.

Mr. Kuntz: 'Now, did you happen to review the two cases the Court inquired about...'

(by Ms. O'Rourke-Mullins):

'I read those cases, yes.' Pg 28, Vol II, 13-16

Q. 'Would it surprise you to find out that the award of Attorney's fees was $50,000 on a forty million dollar piece of property?'

(by Ms. O'Rourke-Mullins):

'I -- that's not what I got out of that case.' Pg 28, Vol II, Ln 23-26.

Q. (In Crncevich)'Would it surprise you that the Attorney's fees were awarded in the amount of $17,000 on a $60,0000 transaction?'

A. 'I don't recall what the amounts were.'

Q. '... Would you like to take an opportunity to re-review those cases?'

A. 'No.' Pg 23, Vol II, Ln 9-14.

POINT IX

THAT THE DISTRICT COURT NEVER RULED ON DEFENDANT'S 12(C) MOTION

Defendant, William Kuntz, III. submitted a Motion under Montana Civil Rule 12 (c) in advance of the trial. The District Court never ruled upon said motion. Contained as exhibits in said Motion are substantial amounts of evidence, which Plaintiff's Attorney claimed to be unaware of at the time of trial and of which the Court refused to allow to go to the Jury.

A short review of that document reveals that in full support of Defendant's position, that there were requests for admissions, made before Judge Sorte, which also were never ruled upon, they clearly establish that Defendant was moving a considerable amount of material from Dayton, Ohio to Wolfpoint - See Notice of Public Sale-Burlington Northern Railroad - June 7, 1993.

Had this motion been ruled upon, as the request for discovery/admissions made two years before the trial, there would have been no need for a jury trial, except for the desire of Plaintiff's Counsel to advance legal theories which cannot and could not be supported by the facts.

What may be of most interest to the Court, but which was never allowed during the trial was that in March, 1992 another Farm of 1,124 Acres went up for sale on WolfCreek. This land was very near the land which is in dispute. Had Defendant been able to disengage himself from the greedy lawyers, he would have been able to proceed to bid at that auction, to fulfill his plans to buy land on Wolfcreek for the future of his business. As things stand now, everything is at a total standstill, awaiting a favorable review of this Trial. (39) Motion under Rule 12(c)

Defendant moved for a mistrial, based upon the non-service of the Motion by Plaintiff to file the Depositions and the non-service of those Depositions at the time of trial. The Court denied said motion.

Plaintiff's attorney fee application seeks some $3,000 for Depositions of Mrs. Cody.

The Court: 'He made a motion for a Mistrial...' Pg 118, Ln 25, 26.

Mr. Kuntz: 'If I can clarify, Your Honor, first, the mistrial is not related to your ruling on the admissibility of those documents. The mistrial was based upon plaintiff's counsel not providing or having the

opportunity to provide the depositions. My mistrial motion has nothing to do with your ruling on this as evidence. It's only on the filing of the depositions and not being given a copy of those depositions at the time or being given an adequate opportunity to examine them...'

Plaintiff's Attorney claims to have impeached her own witness, during the trial, by the use of the deposition testimony. A review of the fee affidavit reveals that Plaintiff wants Defendant taxed for their Xerox bill. To expect Defendant to pay this bill in view that the extra copy of the deposition, not made available to Defendant at the time of trial, is ludicrous. This resulted in such prejudice, that Defendant's motion for a mistrial should have been granted.

POINT X

THAT THE DISTRICT COURT ERRED WHEN IT DID NOT GRANT DEFENDANT'S MOTION FOR A DIRECTED VERDICT

Defendant made a motion for a directed verdict, which appears at pages 77 through 103 with Plaintiff's rebuttal. The District Court denied the Motion. This was clearly an error which merits review and reversal and the granting of a new trial, or in the alternative, vacating the punitive damage award and a new hearing on attorney's fees that may be awarded. Reasonable minds can reach only one conclusion in weighing all the evidence put before the District Court.

The District Court should have granted the directed verdict, because Defendant outlined what was required to prove Plaintiff's case for punitive damages and while the evidence known to the Court clearly supported Defendant, the Court ruled in favor of Plaintiff.

The Court: 'Well, the way I think the Jury would start looking on this thing here is that as the thing went on Cody was afraid that the deal was going to fall through, so she said go ahead and put the wife's name on there, do these things, so she could get her commission.'P.56, L.6-13.

The Court: 'Well, the thing I saw that there was nothing filled in the space. He just crossed out a bunch of vacant stuff.' Pg 58, Ln 20-23

The Court: 'But the point is that why wasn't it put in the original Mortgage when it was sent for signature?' Pg 59, Ln 13-15.

The Court: 'Right now the only thing-what you're trying to do is get some punitive damages out of it.' Pg 60, Ln 19-21.

POINT XI

THAT THE COURT ABUSED DEFENDANT'S RIGHTS TO A FAIR TRIAL BY DENIAL OF HIS RIGHT TO ATTEND AND MAKE A MOTION FOR A NEW TRIAL, AT THE END OF THE JURY CASE

By virtue of being in custody of the Sheriff at the close of the trial and by virtue of the Judges order directing the Sheriff to hold Defendant, Defendant was not able to make a motion in Court for a new trial.

Given the facts that the District Court had held Defendant in contempt for missing a telephone conference set up by Plaintiff's counsel, (see Kuntz Affidavit with supporting letter from AT&T) and in light of the fact that the District Court had not ruled on several pending motions of Defendant, before the trial and before and after the pre-trial Conference, it would have been an useless exercise for Defendant to reduce to writing, a motion which the District Court Judge would not allow to be made in Court. See *Peck - vs - Riverview Lounge, Inc.* Case 95-038-Montana Supreme Court, 900 P2d 270.

JURY RETURNS TO THE COURTROOM (For Punitive Damages Deliberation) Transcript Pg 20.

The Court: 'Mr. Kuntz?'

Mr. Kuntz: 'Am I allowed to speak, Your Honor?'

The Court: 'You can speak as to the stipulation.'

Mr. Kuntz: 'May I return---.'

The Court: 'No.' Pg 20, 21 Ln 25, 26, Ln 1 -4.

The Court: 'I want you to keep him down there in the - in your office until six o'clock. At six p.m. he may be

released.'

Sheriff's Officer: 'Alright, What -- is the charge?'

The Court: 'Pardon'

Sheriff's Officer: 'What I call it -- on the charge?'

The Court: 'I've already found him guilty of Contempt of Court and so we'll call this a punishment for Contempt of Court.' Pg 23, Ln 19-26, Pg 24, Ln 1-3.

It Is clear from the following that Defendant was not in any position to make a motion for a New Trial.

The Court: 'Sheriff's Office.'

Mr. Kuntz: 'Yes, and I was booked.'

The Court: 'And you were booked down there.'

Mr. Kuntz: 'Booked and Fingerprinted.' Pg 96, Vol II, Ln 3-7

By denial of Defendant's right to represent himself, and to make a motion, after the jury award, for a new trial, the Court manifestly abused it's discretion. There is little question that the Court was not very happy at the entire proceedings and said so before, during and after the trial.

CONCLUSION/ARGUMENT

It is rather obvious to Defendant, that the District Court denied Defendant a fair trial, failed to rule on motions before the trial, filed by Defendant, held Defendant in contempt, when there was no contempt, jailed Defendant, before the jury, which only served to inflame the jury's sensations and resulted in an award of punitive damages, where none should have been due Plaintiff.

Further, the District Court made an award of attorney's fees well in excess of what was both reasonable and proper. In effect, the District Court's sympathy for the Plaintiff blinded it to the rather obvious facts of the case.

The Plaintiff offered for sale land for a number of years well in excess of the market price of value for that land. It was never disclosed to Defendants, that Plaintiff was in total default in the contract with Thelma Berglund, the Plaintiff's sister in law.

Notwithstanding this, Defendant wished to proceed and even allowed a release of thousand of dollars from Escrow to obtain the deed from Western National.

Plaintiff cried fraud, fraud, when the payment came due

and was not paid. However, a review of the letter from Mrs. Fadness and Mr. Fadness both to Defendant and to Roger Wimmer, revealed that Plaintiff was under the belief that title was still in his name and not of Defendant.

Defendant, having released money from escrow to allow the deed to come out of trust at Western National then faced with Plaintiff's attempted repudiation of the sale, was fairly fed up. He requested that the title company write to the Plaintiff and explain things. He had, after all accepted the check for $4,000 after the closing.

Plaintiff's counsel makes a big loud amount of noise about the fact that the addition of Defendant's wife to the deed and her omission from the mortgage left the Plaintiff undersecured. This is perhaps a lawyers nightmare, but not one that creates fraud. The Plaintiff realtor advised Defendant that the Plaintiff was agreement to this and the sale proceeded. When the matter of the Acknowledgement of the easement was resolved by the tenant farmer, Dave Madison, matters moved forward.

Plaintiff's lawyer makes a big deal about the offer to take an assignment. Defendant explained in detail, that the assignment of the Mortgage was to maintain the perfected security interest.

Defendant was not allowed to present to the jury evidence as to why he was moving his electronics business to Wolfpoint, such as the purchase by Boeing Aircraft Company of the old air force base at Glasgow, the next county over, which would have made an attractive future customer, if you were in the business of supplier to America's foremost aircraft company.

Defendant was further not allowed to produce and show the jury other evidence, submit his own instructions and questions to the jury. In essence, the District Court was so hostile to Defendant, that the results were almost predetermined by the District Court Judge and he only used the jury of validate his own impression of the matter, notwithstanding the very substantial evidence to the contrary.

For example, with both Mr. Wimmer and Mrs. Cody being sued in another lawsuit, and Defendant having not cross-claimed or countersued Wimmer or Cody, what kind of testimony would be expected. That casting Plaintiff in the most favorable light? Was not the Jury entitled to know that this other suit existed

in order to gauge the testimony of these witnesses?

In short, this case, tried before a jury in Northeastern Montana, is replete with so many errors and clear abuse of discretion on evidence, instructions, procedure and other defects in the proceedings that it warrants reversal and remand, with instruction to vacate the judgment, in order either a new trial or vacate the punitive damages and jury award, as well as the attorney's fee award.

Respectfully Submitted,

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Attorneys for Plaintiff

MONTANA FIFTEENTH JUDICIAL DISTRICT COURT, ROOSEVELT COUNTY

WILBUR A. FADNESS, individually and as successor in trust for MILDRED H. FADNESS,

Plaintiff,

v.

WILLIAM KUNTZ III, ANNE DE LA CHAPELLE KUNTZ,

Defendants.

Cause No. 10780
FINAL JUDGMENT

COMES NOW, the Plaintiff, Wilbur A. Fadness, by and through counsel of record, Kathleen O'Rourke-Mullins, of Sullivan, Tabaracci & O'Rourke-Mullins, 430 Ryman, Missoula, Montana 59802, and submits to this Court an Amended Proposed Judgment in the above captioned matter.

Judgment

A. Pursuant to the Plaintiff's request to elect the remedy of reformation, this Court orders that the mortgage altered by Defendant Kuntz be reformed to reflect the nine percent (9%) interest rate as agreed to the parties.

B. The jury has found that, due to the Defendants fraudulent conduct, the Plaintiffs are entitled to compensatory

damages. This Court concurs with that jury award and finds compensatory damages as follows:

1. Nineteen Thousand, Five Hundred Dollars, ($19,500.00), the remaining purchase price due the Plaintiffs under the terms of the missing promissory note;

2. Nine percent (9%) interest due on the above purchase price from October 4, 1992, to the date of judgment, in the amount of $ 4,266.47.

3. Nine percent (9%) interest on this total judgment amount pursuant to M.C.A. § 25-9-205(2), accruing at the rate of $18.47 per day from the date of judgment.

C. In a separate hearing following the jury verdict, the jury awarded punitive damages in the amount of Thirty-two Thousand Dollars ($32,000.00) attributable to Defendants' conduct rising to actual fraud. This Court has reviewed the jury award of punitive damages and in that review considered each of the following:

1. The Court has considered the nature and reprehensibility of the Defendants' wrongdoing and has found the Defendants' conduct in this matter to be reprehensible;

2. The Court considered the extent of the Defendant's wrongdoing in this matter;

3. The court considered the intent of the Defendants in committing the wrong and found the Defendants' fraudulent conduct to be intentional;

4. The Court considered the profitability of the Defendants' wrongdoing and found that Defendants fraudulent conduct benefitted the Defendants financially;

5. The Court considered the actual damages awarded by the jury in this matter as further set forth in this judgment;

6. The Court considered the Defendants net worth, and finds that Defendants are capable of satisfying the punitive damage award;

7. The Court considered previous awards of punitive or exemplary damages or other potential or prior criminal sanctions against the Defendants based upon these same wrongful acts, and in that consideration find the Defendants have pursued a course of conduct justifying the award; and

8. Lastly, the Court considered other circumstances that may operate to increase or reduce the punitive damage award, the Court finds the Defendants are able to satisfy the amount of the award and finds no reason or argument on the part of the Defendants to reduce the punitive damage award.

9. Having considered each of those factors this Court awards punitive damages to the Plaintiff in the amount of Thirty-two Thousand Dollars ($32,000.00).

D. Plaintiff is entitled to foreclose on the interest of William Kuntz, III, to the real property which is the subject of this matter. Accordingly, a sheriff's sale is hereby ordered.

E. Plaintiffs have submitted a petition and affidavit of fees from counsel Kathleen O'Rourke-Mullins, A hearing was held on February 24, 1995. Both parties appeared through counsel and William Kuntz had the opportunity to cross examine Kathleen O'Rourke-Mullins. Following hearing, this Court reduced the Affidavit of Fees and Costs submitted in the total amount of One Thousand, Five Hundred and Sixty-six Dollars ($1566.00), One Thousand, Two Hundred and Fifty Dollars ($1,250.00) from fees and Three Hundred and Sixteen Dollars ($316.00) from costs.

In conjunction with his ability to foreclose, the Plaintiff is entitled to recover reasonable attorney's fees, as ordered by this Court, in the amount of Sixteen Thousand, Thirteen Dollars and Ninety-five Cents ($16,013.95), and as further substantiated by Plaintiff's Amended Petition for Attorney's Fees.

F. That Defendant Kuntz cause no damage or waste to the subject real property prior to the foreclosure sale ordered above and that should Plaintiff incur further expenses for insurance, damage or waste committed to the said property by the Defendant, these amounts will be recoverable to Plaintiff.

G. As the prevailing party, Plaintiff is entitled to the costs incurred in this action and as substantiated in the Amended Petition of Attorneys Fees and Costs submitted by Kathleen O'Rourke-Mullins in the amount of Three Thousand, One Hundred and Seventeen Dollars and Eighty-two Cents ($3,117.82).

H. Total amount of judgment rendered in this case includes Nineteen Thousand, Five Hundred Dollars ($19,500.00), purchase price of the real property at issue; Thirty-two Thousand Dollar ($32,000.00) punitive damage ward as rendered by the jury

and affirmed by this Court; Sixteen Thousand, Thirteen Dollars and Ninety-five Cents ($16,013.95) attorney's fees awarded to the Plaintiff and as adjusted by the Court: Three Thousand, One Hundred and Seventeen Dollars and Eighty-two Cents ($3,117.82) in costs awarded to the Plaintiff as prevailing party and as adjusted by this Court; Four Thousand, Two Hundred and Sixty-six Dollars and Forty-seven Cents ($4,266.47), nine percent (9%) interest accruing on the purchase price pursuant to the reformed mortgage from October 4, 1992 to date of judgment (March 10, 1995); for a total judgment rendered in the amount of Seventy-four Thousand, Eight Hundred and Ninety-eight Dollars and Twenty-four Cents ($74,898.24). Interest will continue to accrue on the total amount of this judgment at nine percent (9%) from March 10, 1995 at a daily accrual rate of Eighteen Dollars and Forty-seven Cents per day ($18.47).

SO ORDERED, ADJUDGED AND DECREED this 10 day of MARCH, 1995.

DISTRICT COURT JUDGE

Leonard H. Langen

cc: Kathleen O'Rourke-Mullins
William Kuntz, III

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail upon parties or attorneys of record at their address or addresses this 10 day of MARCH 19 95

PATRICIA A. STENNES
Clerk of Court, Wolf Point, MT 59201

No. 95-133

IN THE SUPREME COURT OF THE
STATE OF MONTANA 1996

WILBUR A. FADNESS, individually,
and as Successor in Trust for
Mildred H. Fadness,

Plaintiff and Respondent,

v.

WILLIAM KUNTZ, III and
ANNA DE LA CHAPELLE KUNTZ,

Defendants and Appellants.

FILED

MAR 28 1996

Ed Smith
Supreme Court
Montana

APPEAL FROM: District Court of the Fifteenth Judicial District, In and for the County of Roosevelt, The Honorable Leonrad H. Langen, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

William Kuntz, III, Pro Se, Westport, New York

For Respondent:

Zane K. Sullivan and Leslae J. E. Dalpiaz; Sullivan & Tabaracci, Missoula, Montana

Submitted on Briefs: March 7, 1996
Decided: March 28, 1996

Filed:

Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1995 Internal Operating Rules, the following decision shall not be cited as precedent and shall be published by its filing as a public document with the Clerk of the Supreme Court and by a report of its result to State Reporter and West Publishing Company.

William Kuntz, pro se, appeals from the judgment of the Fifteenth Judicial District Court, Roosevelt County, awarding the plaintiff the principal and interest due on a promissory note and punitive damages arising from defendant's fraudulent conduct in a contract to purchase real property. We affirm.

We consider the following issues raised on appeal:

1. Did the District Court deny Kuntz a fair trial by ordering him detained in the presence of the jury?

2. Did the District Court err in not ruling on Kuntz's motion that his former counsel turn over his file?

3. Did the District Court err in excluding certain evidence and exhibits offered by Kuntz?

4. Did the District Court err in rejecting certain New York pattern jury instructions and interrogatories offered by Kuntz?

5. Did the District Court err in overruling Kuntz's objection to statements in the closing argument relating to the "lumberyard property"?

6. Did the District Court award excessive fees to Fadness?

7. Did the District Court err in not granting Kuntz's motion for a directed verdict?

8. Did the District Court err in not allowing Kuntz to make a motion for a new trial at the conclusion of the jury trial?

This case arises out of a dispute regarding 160 acres of land located near Wolf Point, Roosevelt County, Montana. In 1989, William Kuntz (Kuntz) responded to an advertisement for the property, owned by Wilbur and Mildred Fadness, and contacted the real estate agent, Dorothy Cody (Cody), who had the listing. The terms of the listing called for a $25,000 selling price with thirty-percent down with the balance financed by a contract

for deed at 9% interest. In August of 1989, Cody prepared a buy-sell agreement and forwarded it to Kuntz in New York state. Kuntz made substantial alterations to the terms of the first agreement. Accordingly, Cody sent another agreement to Kuntz which he altered, signed and then forwarded directly to the Fadnesses. The Fadnesses signed the agreement. The buy-sell agreement was filed with the Clerk and Recorder of Roosevelt County. The altered agreement, provided for a $500 down payment, $5,000 cash at closing with the balance of $19,500 financed for ten-months at 9% interest. The agreement also contained a provision, which Kuntz added, that allowed for a ten-month extension upon payment of the accrued interest due and a payment of two points or $390.

In November of 1989, the Fadnesses signed a warranty deed and the deed was not recorded until approximately one year later on November 4, 1990. Kuntz admitted that he added his wife's name, Anna De La Chapelle Kuntz, to the deed "while it was in escrow." The mortgage was filed in Roosevelt County on October 1, 1990. The provision providing for the interest on the outstanding balance had been lined through by Kuntz.

The balance on the note and mortgage was due ten months after closing, in August of 1991. At that time, Kuntz did not exercise his option of extending the note for an additional ten months. In fact, Kuntz did not pay any amount due on the note and mortgage and was in default. Around this time, the Fadnesses were contacted by Allen Sunukjian who introduced himself as an agent of Wolfpack Electronics, and attempted to purchase the Fadness/Kuntz mortgage at a discount. After the Fadnesses declined this offer, they learned that Wolfpack Electronics was owned and controlled by Kuntz, their mortgagee. Mildred Fadness died on December 31, 1991, and Wilbur Fadness was appointed her personal representative for purposes of this action.

In April of 1992, Fadness filed his complaint to foreclose on the property and quiet title. Because the mortgage and note had been altered by Kuntz, Fadness' ability to foreclose on the property was limited to only Kuntz's 1/2 interest in the property and did not extend to his wife's 1/2 interest. Accordingly, Fadness included a claim for fraud, either actual or constructive, and requested that the trier of fact reform the note and mortgage to conform with the agreement of the parties.

On March 10, 1995, the District Court entered final judgment ordering that the mortgage altered by Kuntz be reformed to reflect the 9% interest rate and awarded compensatory damages in the amount of $19,500, the balance due on the note. In a separate hearing following the jury verdict, the jury awarded, and the District Court approved, punitive damages in the amount of $32,000 attributable to Kuntz's conduct constituting actual fraud. In another hearing regarding attorney's fees, the District Court awarded Fadness $16,013.95 in attorney's fees and $3,117.82 in costs. In all, Fadness was awarded $74,898.24. Kuntz appeals from these determinations.

1. Did the District Court deny Kuntz a fair trial by ordering him detained in the presence of the jury?

Kuntz asserts that the District Court denied him the right to a fair trial by ordering him to be removed to the back of the courtroom during the punitive damages phase of the proceedings as punishment for contempt. Fadness responds that the District Court is empowered to punish contempt summarily when committed in the presence of the court. Kuntz does not object to the order of contempt, rather, he objects to the fact that he was punished in the presence of the jury. We note that the imposition of summary contempt and punishment is not regarded with favor, whether exercised immediately or after trial and it is particularly tenuous in the presence of the jury. Sacher v. United States (1952), 343 U.S. 1, 8-11, 72 S.Ct. 451, 455-56, 96 L.Ed. 717. "To summon a [party] before the bench and pronounce him guilty of contempt is not unlikely to prejudice [the party]." Sacher, 343 U.S. at 10. Nonetheless, the error may be harmless in certain circumstances. Davenport v. State (Ga. Ct. App. 1995), 454 S.E.2d 536, 537.

In Davenport, the defendant, pro se, was adjudged to be in contempt of court while in the presence of the jury. Davenport, 454 S.E.2d at 537. While the Davenport court noted that the jury 'should have been excused during the exchange between the judge and the pro se defendant,' the court also determined that under the facts of the case the error was harmless "as the evidence strongly supported the verdict and it is unlikely that the contempt finding affected the result." Davenport, 454 S.E.2d at 537.

We determine that the same is true in the instant case.

Kuntz had been warned throughout trial that his conduct was unacceptable and had also been held in contempt for failing to participate in a conference call prior to trial. The court stated to Kuntz that:

You have complied with none of the rules we have in connection [with discovery]... instead you sent a whole volume of papers that is almost impossible to read when you look through them, and it makes an undue burden on [plaintiff's counsel] and on me, and I dislike it. This whole trial has been one big mess as far as discovery is concerned, mainly because of you. I've tried hundreds of lawsuits. I'm an experienced trial lawyer...this is the worst case I've ever seen, where one of the clients has come through with a bunch of junk like you have and caused nothing but court delays and trouble and time.

Immediately before the judge held him in contempt Kuntz was warned that he was about to be held in contempt. The following exchange occurred:

The Court: I've ruled now....
Kuntz: I take an exception, Your Honor. I am not---
The Court: I don't want to hear anymore from you. Quiet!
Kuntz: Are you going to give a rebuttal---
The Court: I'm going to have the Sheriff put you in jail if you don't shut up.
Kuntz: Then why don't you do that?
The Court: I will.
Kuntz: Well, then go ahead.
The Court: If you keep talking.
Kuntz: Then go ahead now in front of the jury, Your Honor.
The Court: Alright. Where is the Sheriff?
Kuntz: He's right there.
Clerk of Court: Right there.
The Court: Alright. Take him into custody and put him in the jail. Not in the jail, just put him in custody right back here in the pew---
Sheriff's officer: Alright.
The Court: So that he can hear the proceedings.
Kuntz: Thank you, Your Honor.

The Court: You're welcome.
Kuntz: I'm glad the jury understands how this case has been run.
The Court: Put him in--right there. That's good enough.

Thus, from this exchange as well as other portions of the record, it is apparent that Kuntz goaded the court into adjudging him guilty of contempt. As in Davenport, the evidence strongly supports the verdict and the award of punitive damages. Accordingly, we hold that adjudging Kuntz guilty of contempt in the presence of the jury was harmless error in the context of this case.

2. Did the District Court err in not ruling on Kuntz's motion that his former counsel turn over his file?

Kuntz asserts that the District Court did not rule on his motion that his former counsel deliver Kuntz's file. Kuntz received these files by the time of trial and Kuntz does not assert that he was prejudiced. Instead, he merely asserts that suitable arrangements should have been resolved before trial. While this may indeed be true, Kuntz has not shown that he was prejudiced by failing to obtain the files at an earlier date. See George v. Fish Creek Irrigation Co. (1959), 135 Mont. 490, 495, 342 P.2d 738, 741. Accordingly, we hold that based on Kuntz's failure to demonstrate prejudice, the District Court did not err in failing to rule on Kuntz's motion.

3. Did the District Court err in excluding certain evidence and exhibits offered by Kuntz?

Our standard of review relating to discretionary trial court rulings, including the admission of evidence at trial, is whether the district court abused its discretion. Hislop v. Cady (1993), 261 Mont. 243, 247, 862 P.2d 388, 390 (citing Steer, Inc. v. Department of Revenue (1990), 245 Mont. 470, 474-75, 803 P.2d 601, 604). This Court has held that "[i]n the usual case, questions of admissibility of evidence are left largely to the sound discretion of the trial court, subject to review only in cases if manifest abuse." Waller v. Hayden (1994), 268 Mont. 204, 210, 885 P.2d 1305, 1309 (citing Britton v. Farmers Ins. Group (1986), 221

Mont. 67, 86, 721 P.2d 303, 315).

Kuntz asserts that it was error for the District Court to refuse evidence relating to the sale of the subject property from a prior owner, Thelma Berglund, to Kuntz's seller the Fadnesses. He argues that at the time of the sale to him, title to the property was in Berglund's name. Further, Kuntz asserts that it was error to exclude evidence that Fadness was also suing the real estate broker, Cody, and the closing agent, Roger Wimmer, in another suit. He asserts that this evidence related to the "credibility and the underlying dispute, ie [sic] the closing of the Escrow." Kuntz complains that the District Court erred in not admitting an unsigned letter written by Mrs. Fadness. These letters were between Kuntz and the Fadnesses and related to the delinquency on the note.

As to the evidence regarding the Berglund to Fadness contract, the District Court concluded that it was inconsequential to the foreclosure and fraud actions. Kuntz failed to demonstrate that this evidence was relevant and it is within the broad discretion of the district court to exclude irrelevant evidence. Waller, 885 P.2d at 1310.

Likewise, it was within the broad discretion of the court to exclude evidence of the pending suit against Cody and Wimmer. We note that Kuntz fails to cite to where in the record he attempted to introduce evidence of the suit. In any event, Kuntz had the opportunity to cross-examine Cody. Finally, as to the letter from Mildred Fadness, the District Court determined that it was cumulative and that Kuntz had failed to produce it earlier in discovery. The District Court aptly noted that the document could be excluded solely for Kuntz's discovery abuse. Nonetheless, the court allowed Kuntz to argue why the letter was important to Kuntz's defense. Ultimately, the court determined that there was no new information in the document and that the court was "not going to let [him] go on all afternoon on this stuff." See Waller, 885 P.2d at 1309 (citing Rule 403, M.R.Evid.). As this Court stated in Waller:

> The notion that a decision by the district court is discretionary assumes there is no absolutely correct answer for every evidentiary issue. It assumes that the decision is

> a judgment call best left to the person closest to the case--the district judge.

Waller, 885 P.2d at 1310. Similarly, in the instant case, the District Court's judgment was exercised within that permissible range best left to the district court.

4. Did the District Court err in rejecting certain New York pattern jury instructions and interrogatories offered by Kuntz?

Our standard of review relating to discretionary trial court rulings, such as the giving of jury instructions, is whether the district court abused its discretion. Hislop, 862 P.2d at 390. Here, the District Court considered fifteen instructions and seven interrogatories proposed by Fadness as well as New York pattern instructions and interrogatories submitted by Kuntz. Even though the instructions and interrogatories submitted by Kuntz did not comply with Montana's District Court Rules, the Court considered them and gave New York Pattern Instruction No. 81 over Fadness' objection. In addition, the court submitted several of Kuntz's interrogatories to the jury.

During the jury's deliberations, the jury submitted a list of questions relating to Kuntz's interrogatories to the court for clarification. The court told Kuntz that:

> I intend to advise the jury that they need not consider nor answer the interrogatories propounded to them by the defendant, unless the defendant can show me or tell me why the answers to these questions can be relevant concerning any matter relating to this case. I'll ask you to tell--put in the record why these questions are relevant.

Kuntz made no such showing. Accordingly, the court instructed the jury to cease in its attempt to answer Kuntz's interrogatories.

Thus, from the record, it is clear that the District Court carefully considered the instructions and interrogatories offered by Kuntz. The court was acting within its discretion in refusing Kuntz's offered instructions and interrogatories and in instructing

the jury not to answer several of Kuntz's irrelevant interrogatories.

5. Did the District Court err in overruling Kuntz's objection to statements in the closing argument relating to the "lumberyard property?"

Kuntz asserts that Fadness' counsel made an improper reference to the price Kuntz paid for the former UBS Lumberyard in Wolf Point. The court directed Kuntz that "[n]ow I'm not going to let you get up here and give a speech. You have not made a definite objection. [Plaintiff's counsel] [y]ou may proceed." Furthermore, we note that in objecting, Kuntz was able to correct any misstatement of the purchase price. We determine that the District Court did not abuse its discretion in overruling Kuntz's objection to statements regarding the "lumberyard property."

6. Did the District Court award excessive fees to Fadness?

Under the terms of the mortgage, Fadness is entitled to costs and reasonable attorney's fees. Kuntz asserts that the fees and costs awarded against him were excessive. A hearing was held to determine the amount of fees and costs due to Fadness. At the hearing, Kuntz offered the testimony of witnesses regarding the fees charged by other attorneys in the area in an attempt to challenge the fees requested by Fadness' counsel.

During the hearing, the court also questioned the fees and reduced the amount of fees and costs for travel to Wolf Point as well as the amount of fees requested for the deposition of real estate agent Cody. The District Court also stated that "Mr. Kuntz, I think your actions in this matter are the very things that made this case so complicated." Thus, from the record it is clear that the District Court considered all of the evidence and testimony presented and did not abuse its discretion in its award of costs and attorney's fees.

7. Did the District Court err in not granting Kuntz's motion for a directed verdict?

Kuntz asserts that the District Court improperly denied his motion for a directed verdict. A motion for a directed verdict is properly granted only in the complete absence of any evidence to warrant submission to the jury, and all inferences of fact must be considered in the light most favorable to the opposing party. If the evidence viewed in a light most favorable to Fadness indicates that reasonable men could differ as to the conclusions drawn from the evidence a directed verdict is not proper. Guertin v. Moody's Market (1994), 265 Mont. 61, 69, 874 P.2d 710, 715. From the record, and from the jury's verdict, it is apparent that there was sufficient evidence to overcome Kuntz's motion for a directed verdict. Accordingly, we hold that the District Court did not err in denying Kuntz's motion for a directed verdict.

8. Did the District Court err in not allowing Kuntz to make a motion for a new trial at the conclusion of the jury trial?

Kuntz asserts that he was not allowed to make a motion for a new trial in court because he was in the custody of the sheriff at the close of the case. We note that pursuant to Rule 59(b), M.R.Civ.P., a party has ten days after the service of notice of entry of judgment within which to file a motion for a new trial. Accordingly, Kuntz was not prejudiced because he was not able to move for a new trial in court. Kuntz had ten days after the service of notice of entry of judgment to move for a new trial.

Under Rule 59(a), M.R.Civ.P., Kuntz was required to "state with particularity the grounds [for the motion for a new trial], it not being sufficient merely to set forth the statutory grounds..." Here, Kuntz made no such motion and did not articulate any particular grounds whatsoever to the District Court. In fact, Kuntz did not even file a motion for a new trial with the district court. Rather, Kuntz asserts that "it would have been an [sic] useless exercise for Defendant to reduce to writing, a Motion which the District Judge would not allow to be made in Court."

We do not agree with Kuntz's assertion that it would have been a "useless exercise" to file a motion for a new trial. Kuntz's obligation to comply with Rule 59(b), M.R.Civ.P., was not suspended merely because he was dissatisfied with the District Court's rulings. In failing to properly make a motion for a new

trial, Kuntz is deemed to have waived any objection. Accordingly, we hold that Kuntz waived this issue on appeal due to his failure to file a motion for a new trial pursuant to Rule 59, M.R.Civ.P., with the District Court.

Affirmed.

s/W. William Luphurt

Justice

We concur:

s/

s/

s/

IN THE SUPREME COURT OF THE
STATE OF MONTANA
CASE 95-133

WILBUR A FADNESS, INDIVIDUALLY, AND AS
SUCCESSOR IN TRUST FOR
MILDRED H FADNESS

PLAINTIFF AND RESPONDENT

-VS-

WILLIAM KUNTZ,III AND
ANNE DE LA CHAPELLE KUNTZ

DEFENDANTS AND APPELLANTS

PETITION FOR REHEARING UNDER MONTANA APPELLATE RULE 34

WILLIAM KUNTZ, III
64 S MAIN STREET
WESTPORT, NEW YORK 12993-0026
518-962-4966

Now comes Defendant-Appellant, William Kuntz, III, appearing Pro Se, and respectfully moves the Court for rehearing on this matter, which was decided on the 28th of March, 1996.

Under Rule 34, the grounds upon which a petition may rest are either 'that some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court

was not directed.'

1} On page 9 of the decision, the Court states that the letter from Mrs Fadness was 'unsigned' and the letters 'between Kuntz and the Fadnesses... related to the delinquency on the note'

If The Court would care to examine the letter and the exhibits being numbers 22,23,24,25,26,27 & 28, it would be clear that the letter was signed by both Mr. and Mrs Fadness.

Transcript at page 113

Mr. Kuntz: 'Exhibit 22 is a letter signed either by Mr. or Mrs Fadness. The handwriting appears to be signed by both parties. I can only say that it appears that Mr. Fadness's handwriting has a slight tremble, and Mrs Fadness's handwriting...'

The Court: 'We don't need your comments'

Mr. Kuntz: 'I'm sorry Your Honor.'

The Court: 'This is just an offer of proof so that you can take that up to the Supreme Court when you appeal.'

Subsequently, both Defendant and Roger Wimmer of the Title Company wrote to Plaintiffs, before the August 3, 1991 date with regards to the mortgage and Plaintiff's were adamant that they in fact had not 'sold' the property.

Under Montana Rules of Evidence, section 26-1-607 'when writings of a decedent prima facie evidence. The entries and other writings of a decedent, made at or near the time of the transaction and when the decedent was in a position to know the facts stated therein, are prima facie evidence of the facts stated therein...'

The evidence before the District Court was that the Plaintiff's were unable to preform the buy-sell agreement and under the terms of the agreement, Defendant paid down $5,500 and the Plaintiff took back a mortgage. Almost a year later, Plaintiff's come back to Defendant and say. 'you never bought the land, it is still ours, this was clearly a repudiation or an attempted repudiation.

Defendant offered a signed, handwritten letter, by Plaintiff and deceased Mrs. Fadness, which supports this effort to

repudiate. Under your Montana Law, this is prima facie evidence. Judge Langen would not allow this to go to the jury. He said it was not produced before trial. It was produced before trial and was contained in the Rule 12c motion. Is it Defendant's fault, that neither Judge Langen nor Plaintiff's counsel looked at the exhibits in the Rule 12c motion.

A careful review of these exhibits, which were produced in advance of the trial, but were ordered excluded by Judge Langen clearly reveals that Defendant wrote to Plaintiff prior to any default and prior to the date upon which the first payment was due to the Plaintiff.

> The typewritten note, dated June 14, 1991 clearly says 'please call or write with your correct address and phone number as a payment is now due on your mortgage in Wolfpoint- -/s/ Bill Kuntz'

On July 25, 1991, by certified mail, the Plaintiff's sent a handwritten note back to Defendant, together with copies of the buy-sell agreement and the settlement statement. Also enclosed was the original letter dated October 4, 1990 from Roger Wimmer at Roosevelt County Abstract Company, which while addressed to Defendant, appears to have been mailed to Plaintiff in error. This physical evidence cannot be disputed as the actual creases in the letter clearly match the enclosure in the envelope.

It was in that letter, and handwritten note in which the Plaintiff sought to repudiate the sale to Defendant.

> 'Mr. Kuntz, we hold the title to the land - not you. Suggest you read the enclosed documents. As of August 3, 1991 you owe 9% in interest, plus the full amount of contract. If you decide to roll it over, you still owe 9% interest of balance plus $390 payable August 3, 1991.
>
> Please remit amount due by the time allotted or the contract is null and void /s/W.A.Fadness, Mildred H Fadness

A careful reading of Rule 12{c} states that 'if, on a motion

for judgment, on pleadings, matters outside the pleadings are presented to and not excluded by The Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.'

Montana Rule 56 provides that a motion for summary judgment may be made 'with or without supporting affidavits,'

It must be therefore quite clear that Judge Langen clearly abused his discretion in excluding this evidence. It is also clear that in the decision of March 28, 1996 the Supreme Court of Montana, overlooked the fact that the excluded letter, was signed and was produced prior to the trial.

2} Another set of salient facts which the Court has not fully considered is that the name of Kuntz's wife was added to the deed upon the express writing of Plaintiff's realtor, Dorothy Cody, while the deed was in the possession of Dorthy Cody.

The buy-sell agreement, prepared by Dorthy Cody otherwise known as an offer, was made by Defendant to Plaintiffs upon terms which Defendant was prepared to purchase the property. The Defendant sent the offer to Plaintiff and they accepted the offer and forwarded the agreement to the realtor in Wolfpoint, where it was recorded.

After accepting the Defendant's offer and after Defendant had overfunded the escrow account at Roosevelt County Title Abstract, the Plaintiff's were unable to preform the contract as they could not obtain the deed of Thelma Burglund from the Western National Bank. They had been in default of that trust contract for several years. It was only when Defendant agreed to allow the release of the escrow, that the deed in trust could be obtained.

When the mortgage was recorded, the title to the land was in the name of Thelma Burlund. The fact that lines on the mortgage were crossed out, was in contemplation of the execution of a note. There was no note. Despite all the documents prepared by the lawyer in Wolfpoint, by Dorthy Cody realtor and state representative and the title company, nobody has a copy of the note, because one was never drawn.

Plaintiff's claims for fraud against Defendant, when the evidence was considered by the jury, failed. Where Judge Langen would not allow relevant evidence, showing ownership of the land at the time the Plaintiff's entered into the buy-sell agreement, were not allowed to go before the jury.

Rule 102 of the Montana Rules of Evidence provide 'These Rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.'

Under Rule 403 of the Rules of Evidence,

'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...'

The fact that Plaintiff's had been in default of their own contract to purchase, concealed from Defendant, until discovered in the title commitment, is clearly relevant evidence.

In Fadness vs Cody and Wimmer lawsuit, in which Plaintiff's claim against the realtor and the title company are clearly relevant. If Plaintiff or Plaintiff's agent had some objection to the construction of the mortgage, which was filed with the Recorder, before the closing, and available for several days, prior to the closing, they simply could not have closed. At best, the mortgage from Defendant to Plaintiff, filed with the Recorder, when the title was in the name of Thelma Burlund, would have been a cloud upon the title.

Plaintiff accepted the benefits of the closing, ie the release of the escrow, curing the default of the trust at Western National Bank, and accepted and apparently cashed the check from the title company. Only later, the following year, did they seemingly have second thoughts about the transaction.

It was only after the letter of repudiation, that Defendant sought to obtain the assignment of the mortgage. Plaintiff acts and states that attorney Sunukjian's offer on behalf of Wolfpack Electronics was some big secret.

The evidence suggests otherwise.

For example, Defendant's exhibit 54 is an affidavit of publication from the Wolfpoint Herald News that Wolfpack was planning to apply to the Federal Communication Commission for a license. Defendant's exhibit 66 is an ad placed in Wolfpoint on the 11th of April, 1991. Transcript Pg 124.

> 'Thereby clearly establishing that anybody making a reasonable inquiry would be aware that there was such a company and that such-- in my impression that the Fadnesses were not taken unawares by Mr. Sunukjian's offer...'

Exhibit 55 is a letter Defendant wrote on the 7th of July, 1991 to Plaintiffs. As The Court may note, the last sentence clearly states

> ' it is that mortgage of which I spoke in seeking to ask about an assignment.'

Also placed into evidence, for offer of proof were pictures of Defendant Lumber Yard in Wolfpoint and unloading of a railroad box car in the middle of town. Hardly a secret.

3} The Court has incorrectly assumed that Defendant received and had use of the files of his former attorneys prior to trial. The record and letter from the attorneys in Willison, ND is quite clear. Defendant's exhibit 67 clearly asks that the file not be turned over to Defendant. Mr. Duane Kurokawa identified those attorneys as the same lawyers who represent Western national Bank, the trust agent for the Burlund deed. Transcript pg 126-138 outside of the presence of the jury.

Transcript pg 131

Testimony of Duane Kurokawa

Mr. Kuntz: 'I'm now handing you what's been marked Defendant's exhibit 67, subject to the court's ruling. May I ask you this first. How long have you worked for the bank?'

Mr. Kurokawa: 'Since 1979.'

Mr. Kuntz: 'Have you ever had dealings with the bank's counsel?'

Mr. Kurokawa: 'Yes, I have.'
Mr. Kuntz: 'And where are they located?'
Mr. Kurokawa: 'Willison, North Dakota'
Mr. Kuntz: 'And, as, would you take a look at that exhibit. Did you take and look at it--is that to your knowledge and information the same group of lawyers?'
Mr. Kurokawa: 'Yes it is'

The record is clear that the file was not delivered to Defendant, but to the District Court Clerk, under subpoena. It is clear from the letter, that Defendant did not have access to the file.

Counsel for the Bank was also counsel for the Defendants when they withdrew, the failure of the District Court to rule when counsel withdrew is clear and the prejudice is obvious given the role of Western National Bank as holder of the Berglund deed in trust.

4} Defendant did nothing to 'goad' Judge Langen. Judge Langen made prejudicial statements well in advance of the custodial restraint of Defendant.

The transcript reveals on page 13, that the Defendant was reasonably testifying from the stand, when Plaintiff's counsel made an objection.

Ms O'Rourke-Mullins:
'Your Honor, objection, we're going to get a history of the Defendant's life for the last ten years.'
Kuntz: 'Financial history.'
Ms. O'Rourke-Mullins:
'What this court only needs to be concerned with, what the jury only needs to be concerned with is his net worth and financial condition right now.'
The Court: 'Yes'
Kuntz: 'Your Honor, Your Honor'
The Court: 'The objection is sustained, I don't want any personal history about you at all.'
Mr. Kuntz: 'Your Honor, I'm simply giving the jury-I'm-'
The Court: 'I know what you are doing, I know what you are doing, I wasn't born yesterday.'

There is nothing in this exchange in which the Defendant 'goaded' the Court.

On page 16, within two lines the Court allows a presentation to the

jury and then reversed itself.

The Court: 'Alright, present it to the jury and see what they say.'

Kuntz: 'The what? Can I put in the UBC Yard and the lawyers bill so they get a further--'

The Court: 'No, I don't think we need anything more.'

On page 13, Ms. O'Rourke-Mullins made an objection. On page 16, Judge Langen told Defendant he could present it to the jury.

On page 17, Judge Langen said

'I've ruled not, we're--pick up all those papers, if they haven't been introduced into evidence.'

Mr. Kuntz: 'I take an exception, Your Honor, I am not---'

The Court: 'I don't want to hear anymore from you. Quiet' Mr. Kuntz: 'Are you going to give a rebuttal---'

The Court: 'I'm going to have the sheriff put you in the jail if you don't shut up.'

It is clear that nothing that Defendant did or said was contempt or goading. Judge Langen had already made his derogatory comments before the jury.

Taking an exception or asking about rebuttal is well within the decorum of the courtroom. There was no invective no four letter words, swearing, threats or anything which would or could be an affront to the dignity of the court.

What Judge Langen did not say, nor would any seasoned Judge say, is that the weight of the evidence, if left to the jury, would undo the numerous sympathetic rulings in favor of the Plaintiff.

Under Part 4, Section 25-7-404 of the Montana Rules of Civil Procedure, the Jury was entitled to take papers into the jury room. Instead, all the papers were picked up by the Sheriff and the jury was not allowed to examine even those papers, which were admitted. Clearly this was not harmless error. A fair trial was denied.

In the March 28, 1996 Decision, the Supreme Court has concluded that the contempt was justified by virtue of the prior contempt. It is clear that the Court has failed to fully appraise itself of those facts.

Defendant submitted by way of affidavit and a letter from AT&T that the operator was one minute late in hooking up

Defendant to the conference pretrial call and as a result, he missed the call.

Black's Law Dictionary, revised 4th Edition, defines contempt of court as follows:

> 'Any act which is calculated to embarrass, hinder or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity.'

Defendant submitted documentary evidence, both by way of his affidavit and by letter from AT&T that he was waiting at a truck stop, at a phone in upstate New York, for an operator in California to make a connection between Missoula and Glasgow and New York. This call spanned the country and by virtue of what may be referred to as a technical glitch, Defendant was one minute late. How can this be contempt? What fault did Defendant make, when the conference call was in the full control of the telephone company.

With all due respect, Judge Lange, as the transcript record of the call will show, then engaged in an extensive ex-parte discussion with plaintiff's counsel. Not knowing the new identification number of the renewed conference call, how was Defendant, located in New York, supposed to 'catch-up' to a call which he had been excluded and which plaintiff's counsel took full advantage to suggest that Defendant's absence was willful.

5} It appears that there is some confusion as the with assignment of error. Defendant described this as motion for a new trial, when in fact the appropriate Montana Rule was Rule 50 for a directed verdict.

6} Defendant's 'failure' to make a motion for a new trial under Montana Rule of Civil Procedure 59 should not be constructed into a waiver of objections.

A reading of Montana Rule 59 does not state that a failure to make a motion is fatal to any appeal. Rule 59A states in part that 'a new trial may be granted...'

Montana Rules of Appellate Procedure state in Rule 1, 'In civil cases a party aggrieved may appeal from a judgment or order...' There is no conditional or exclusive effect that if a party does not make or file a motion for a new trial, that his rights under the appeal are in anyway curtailed.

With all due respect, the degree or level of Judge Langen's

mood is clear on the subject. Transcript pg 27, VII

The Court: 'I don't want to hear anymore of this, you're getting way off, and we'd be here all day if you're going to go into retry of the lawsuit.'

Mr. Kuntz: 'We not re-trying.'

The Court: 'The lawsuit's been tried.'

Mr. Kuntz: 'We're not re-trying the lawsuit, Your Honor.'

The Court: 'In my opinion, you are...'

For this court to rule that a 'failure' to file a Rule 59 motion preempts assignment of errors, clearly denies Defendant due process and equal protection. There is nothing contained in Rule 59 which would believe to reveal that a failure to file such a motion would preclude a comprehensive appeal.

****

It is clear, that this case has evoked the sympathy of the District Court Judge, and as a result, a simple contract case became a matter subject to substantial litigation.

Judge Langen had a lot of difficulty with this case, because he did not want to see the evidence. He did not want the Jury to reach the finding that the evidence would show.

He complained that Defendant had delayed the case, when the record is clear that Plaintiff requested the cancellation of the trial date in 1993.

He was upset that 'Mr. Kuntz, I think your actions in this matter are the very things that made this case so complicated.' There was nothing complicated about this case. What was complicated was keeping out Defendant's evidence.

If the Court will review the record, what is remarkable is that almost every document that Judge Langen excluded was an original document. All the normal evidence pitfalls, of authentication, were thus removed.

The evidence, when fairly heard and considered by the jury came out in favor of Defendant. For example, even when the jury found that Plaintiff's realtor agreed to the addition of Defendant's wife to the deed and exclusion from the mortgage, the Court's judgement subjected her to the $73,000 judgement. Clearly

this is wrong on the facts and law.

If this Court wants to be the sympathetic home for Mr. Fadness, it should do so upon the facts and evidence. Where Plaintiff elected for a jury, and that request was made well into the case, it is for the jury to determine the facts.

The Court discussed the findings of the jury in supporting the verdict. Where relevant evidence is withheld from the jury, how can the jury reach a proper verdict.?

Is the letter of repudiation, signed by deceased Mrs. Fadness, defined as prima facie evidence, an item which should have gone to the jury? If then, the prima facie evidence is that Plaintiffs sought to repudiate what they had already ratified, is then the letter seeking to take an assignment of the mortgage not evidence of a phone conversation and an offer to settle under Rule 408 of the Rules of Evidence? If then, is not the letter of Mr. Sunukjian a further offer under rule 408?

Judge Langen, Defendant submits was well aware of the effect of a repudiation of the sale. prior to the date upon which the payment was due. Why would Judge Langen go to such lengths to keep out the letter?

If the jury had seen that letter, Defendant believes that the jury would have come to a much different verdict.

Wherefore Defendant prays that the Court grant the Petition for Rehearing.

Respectfully submitted,

William Kuntz, III
64 S. Main Street
Westport, New York 12993-0026
518-962-4966

July 7, 1991
MR. & MRS. Fadness
3251 W 78th St.
THE DALLES, OREGON
97058

Re: Your recent telephone call

Dear Mr.& Mrs. Fadness:

I have reviewed your file with regards to the property in Wolfpoint, Montana. I have among other papers a copy of the deed sent to me by Mrs. Cody, and the title insurance showing myself and my wife as fee simple owners of your former property. I also have a copy of the current tax bill rendered in our name. Accordingly I am at a loss to understand what you mean by the contract being "null and void". As title has passed to us your only remaining interest is in the mortgage. It is that mortgage of which I spoke in seeking to ask about an assignment.

I trust that this will answer your concerns.

William Kuntz, III.
64 S Main ST
Westport, NY
12993-0026
518-962-4966

IN THE SUPREME COURT OF THE
STATE OF MONTANA
No. 95-133

WILBUR FADNESS, Individually and as Successor in Trust for MILDRED FADNESS,

Plaintiff and Respondent

v.

WILLIAM KUNTZ III and ANNA DE LACHAPELLE KUNTZ,

Defendants and Appellants.

ORDER

On April 12, 1996, defendant William Kuntz III, pro se, filed his petition for rehearing. After fully considering the petition for rehearing and the response, it is

HEREBY ORDERED that the petition for rehearing is DENIED.

DATED this 25th day of April, 1996.

FILED

APR 25 1996

Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

Chief Justice

Justices

Justice Terry N. Trieweiler would also deny the petition for rehearing.